

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JASMINE R. GADDY**  
Claimant

VS.

**GOLDEN CORRAL**  
Respondent

AND

**TRUCK INSURANCE EXCHANGE**  
Insurance Carrier

Docket No. 1,052,507

## ORDER

## STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the October 11, 2013, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge (ALJ) Brad E. Avery. James B. Biggs of Topeka, Kansas, appeared for claimant. Lyndsay E. Spiking of Kansas City, Missouri, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 18, 2012, preliminary hearing and exhibits thereto; the January 28, 2013, Independent Medical Evaluation Report by Dr. Vito J. Carabetta filed with the Division of Workers Compensation (Division) on January 31, 2013; the March 15, 2013, report of Dr. Vito J. Carabetta filed with the Division on March 25, 2013; the transcript of the September 11, 2013, deposition of Dr. Vito J. Carabetta and exhibit thereto; the transcript of the October 2, 2013, deposition of Dr. John H. Gilbert and exhibits thereto; the transcript of the October 8, 2013, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

## ISSUES

Respondent admits claimant's work activities with respondent resulted in mild left carpal tunnel syndrome and moderate right carpal tunnel syndrome. However, respondent denies that claimant's left ulnar nerve condition/cubital tunnel syndrome arose out of and in the course of her employment with respondent or was the natural and probable consequence of claimant's carpal tunnel syndrome.

Claimant alleges three possible causes for her left cubital tunnel syndrome. First, her left cubital tunnel syndrome was the direct result of her work activities at respondent. Second, claimant alleges that after her right carpal tunnel release, she was unable to use her right hand. That, in turn, forced claimant to put additional strain on her left hand, resulting in left cubital tunnel syndrome. Third, claimant asserts she used a heating pad while sleeping, as suggested by her physical therapist. While sleeping with the heating pad, claimant's elbows bent more than 90 degrees, causing or contributing to her left cubital tunnel syndrome.

ALJ Avery found claimant's left cubital tunnel syndrome arose out of and in the course of her employment with respondent and ordered medical treatment with Dr. Lynn D. Ketchum until claimant is declared to be at maximum medical improvement.

The issue is:

Did claimant's left cubital tunnel syndrome arise out of and in the course of her employment with respondent?

#### **FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

This Board Member incorporates by reference the findings of fact contained in the Board's June 17, 2013, Order.

On March 27, 2013, ALJ Avery issued a brief Order granting claimant's request for medical treatment with Dr. Ketchum for evaluation and possible treatment of ulnar symptoms identified by Dr. Vito J. Carabetta until further order or until certified as having reached maximum medical improvement. Respondent appealed to the Board, which reversed the preliminary hearing Order on June 17, 2013. In the Board's Order, a Board Member found Dr. Carabetta did not address causation and claimant failed to prove her left ulnar nerve issues, including cubital tunnel syndrome, arose out of and in the course of her employment with respondent.

Following the Board's June 17, 2013, Order, Drs. Carabetta and John H. Gilbert were deposed and a second preliminary hearing was held. In a letter dated July 26, 2013, to claimant's attorney, Dr. Carabetta stated:

You have posed a rather serious question, and I have scoured the original records in order to address it correctly. You ask whether or not the claimant's work activities at Golden Corral caused, contributed to, or aggravated the claimant's current cubital tunnel syndrome. Based on the available information, within a reasonable degree of medical certainty, my opinion is that very likely the activities at Golden Corral

were instrumental in creating these problems. My suspicion is that there was so much interest with regard to her right side that issues surrounding the left side went unaddressed.<sup>1</sup>

Dr. Carabetta testified the ulnar nerve is a big, thick cable of a nerve that damages slowly. He testified:

She has had symptoms from the get-go about having left upper limb symptoms that were odd that unfortunately people as they examined her clinically went off on a tangent and missed checking for a few basics. I suspect they would have spotted this from the very beginning if they looked for it rather specifically. But bottom line is, if it looks like a duck, and it quacks like a duck, and it waddles like a duck, it's probably going to fly like a duck. And in this case, it's a duck.<sup>2</sup>

Dr. Carabetta indicated claimant made upper extremity complaints when she completed a patient questionnaire on April 14, 2009. The doctor agreed that an April 2009 EMG conducted by Dr. Zhengyu Hu revealed no left ulnar nerve deficits or issues. Dr. Carabetta testified he had concerns about how and when the EMG was conducted. The doctor testified it was not clear if claimant's elbow was maintained in a right angle position. He was also concerned because the EMG was conducted within a few weeks after the onset of claimant's symptoms.

Dr. Carabetta was asked about the cause of claimant's cubital tunnel syndrome:

Q. (Ms. Spiking) So I guess, Doctor, what I am trying to get at is you have testified that cubital tunnel syndrome is a condition that develops over time, correct?

A. (Dr. Carabetta) Correct.

Q. You testified that we do not know nor will we ever know precisely what caused the cubital tunnel syndrome in this case?

A. Correct.

Q. You have testified that her sleeping habits could be contributing and potentially a causative factor?

A. That is generally about how 20 percent of the population develops cubital tunnel syndrome without an industrial exposure. As we curl up into [a] fetal position, as we

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<sup>1</sup> Carabetta Depo., Ex. 1.

<sup>2</sup> *Id.* at 6-7.

get into deep sleep, that's where we try to have patients use a splint at night to keep them from doing so.<sup>3</sup>

Dr. Carabetta acknowledged claimant underwent a number of physical examinations up to September 6, 2011, and in none of those examinations was there a clinical presentation of cubital tunnel syndrome. The doctor acknowledged that by September 6, 2011, claimant had not been employed by respondent for approximately 18 months and had been employed as a clerk in a convenience store. He indicated he was familiar with the duties of a convenience store clerk as he had been in convenience stores on numerous occasions. The following discourse took place at Dr. Carabetta's deposition:

Q. (Ms. Spiking) But it continues to be your opinion despite all of that within a reasonable degree of medical certainty that her cubital tunnel syndrome first diagnosed 18 months after she left her employment with Golden Corral was as a result of her work activities at Golden Corral?

A. (Dr. Carabetta) My opinion is that it was probably first correctly diagnosed at that point. I believe she probably had it in evolution the whole time and clinicians were not able to pick it up. And I'm not certain I would have in the beginning either.

Q. But can you state that -- you can evaluate the contemporaneous medical records and the whatever is noted by the physicians therein, but whether or not a physician in your words missed it early on is purely speculation?

A. Correct.

Q. So you are not saying here today within a reasonable degree of medical certainty Dr. Polly didn't see it, Dr. Gilbert didn't see it. You are guessing that that is possibly the case?

A. In reading through the reports, I don't think they asked her that much about her specific symptoms. They have very few words about the symptoms in there. If they had asked a whole lot more detailed questions, they might have had an opportunity to get more information out of her.<sup>4</sup>

On June 2, 2010, Dr. Gilbert physically examined claimant, including her left upper extremity. The doctor testified that at that time, he did not clinically detect evidence of ulnar nerve dysfunction. Claimant was evaluated and physically examined by Dr. Gilbert a second time on July 27, 2011. According to Dr. Gilbert, very little had changed since he saw claimant in June 2010, other than her right hand grip strength was lower. The doctor testified he again did not clinically detect evidence of ulnar nerve dysfunction.

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<sup>3</sup> *Id.* at 26-27.

<sup>4</sup> *Id.* at 27-28.

Dr. Gilbert evaluated and physically examined claimant a third time on April 6, 2012. When asked if he found any evidence of ulnar nerve dysfunction, Dr. Gilbert answered: "She had some generalized weakness, which could be a manifestation of that."<sup>5</sup> In a letter to respondent's counsel dated April 25, 2012, Dr. Gilbert stated:

Ms. Gaddy's complaints and findings at this point are sufficiently diffuse and nonspecific that I am uncertain as to the exact status of her ulnar nerves. She showed no evidence of ulnar nerve compression and showed evidence of good ulnar nerve function at the time I examined her on June 2, 2010, by which time she was no longer working at Golden Corral, and I would therefore be of the opinion that ulnar nerve entrapment, should it exist, is not causally related to her activities at Golden Corral.<sup>6</sup>

Dr. Gilbert acknowledged claimant made complaints of left upper extremity symptoms as early as April 2009, but indicated those complaints were for numbness and tingling in her left wrist. The doctor also indicated he had no reason to believe the April 2009 EMG failed to detect cubital tunnel syndrome that existed at that time. Dr. Gilbert testified, "[T]here's no scientific evidence that cubital tunnel syndrome has an occupational etiology."<sup>7</sup>

At the October 8, 2013, preliminary hearing, respondent again admitted claimant's bilateral carpal tunnel syndrome was compensable. Claimant again testified about her job duties at respondent, including that she kneaded dough for rolls three to four hours a day and also kneaded dough for 20 to 25 pizzas a day. She testified that after undergoing a right carpal tunnel release in October 2009, she returned to work at respondent and her job duties changed to running a cash register and handing out drinks and plates at the front line. For five days claimant was limited to using her left upper extremity. Her left arm began bothering her more and she notified Dr. Richard E. Polly, but he provided no treatment. Claimant testified, "He [Dr. Polly] told me we'd worry about the right and deal with the left later."<sup>8</sup> Claimant testified she made left upper extremity complaints to Dr. Gilbert, but he provided no treatment.

After developing bilateral upper extremity problems while working for respondent, claimant first saw Dr. Donald T. Mead. Claimant testified she made bilateral upper extremity complaints to Dr. Mead, who prescribed a muscle relaxant and physical therapy. She recalled the EMG conducted by Dr. Hu and that he put needles into the top side of her

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<sup>5</sup> Gilbert Depo. at 15.

<sup>6</sup> *Id.*, Ex. 5 at 2.

<sup>7</sup> *Id.* at 31.

<sup>8</sup> P.H. Trans. (Oct. 8, 2013) at 37.

left elbow. Claimant testified she experienced tingling and pain in her left elbow when she worked at respondent and it is still present and is about the same. She noticed her left upper extremity symptoms more after her right carpal tunnel release.

According to claimant, since 2009 she has slept with her arms bent at the elbows because in physical therapy it was suggested rotating heat and cold compresses to figure out which worked best. Claimant found heat worked best and, while sleeping, would have to hold a heating pad across her chest with her elbows bent. She indicated she did not sleep that way before using the heating pad.

Claimant testified that after she left respondent, she worked at a gas station, but her duties were not repetitive and her hands did not worsen. After leaving her employment at the gas station, claimant worked at Casey's General Store since 2011, where she is the assistant manager. Claimant denied that her job duties at Casey's caused her left upper extremity condition to worsen.

At the October 8, 2013, preliminary hearing, claimant introduced additional medical records of Dr. Lynn D. Ketchum. After not seeing claimant since October 26, 2010, Dr. Ketchum saw claimant on June 5, 2013. Dr. Ketchum's notes from that visit indicate claimant had an EMG with Dr. Carabetta that showed mild cubital tunnel syndrome. Dr. Ketchum noted claimant slept with flexed elbows and apparently recommended a left elbow restraint. The doctor indicated: (1) claimant's left ulnar nerve subluxed when she flexed her elbows and it irritated her if she did that repetitively and (2) claimant had mild weakness of adduction of the left fifth digit.

On July 9, 2013, Dr. Ketchum indicated claimant mistakenly had been given a restraint for the right elbow and not the left. He noted claimant's left elbow was the one really bothering her and he prescribed a left elbow restraint. On August 21, 2013, Dr. Ketchum noted claimant again had been denied a left elbow restraint by the workers compensation insurance carrier.

On October 11, 2013, ALJ Avery issued a lengthy and detailed preliminary hearing Order in which he concluded:

The Court finds it is more likely than not claimant's cubital tunnel syndrome was caused by claimant's work duties at Golden Corral and therefore arose out of and occurred in the course of her employment with the respondent. The medical experts who testified identified three competent causes for claimant's cubital tunnel syndrome: 1) her work duties at Golden Corral before undergoing treatment[,] 3) *[sic]* claimant's work duties after surgery requiring use of the left hand only and 3) her practice of sleeping with her arms crossed, which was initiated as a means of alleviating the upper extremity symptoms resulting from an otherwise admitted compensable injury.

. . .

Dr. Carabetta's assessment appears correct that Dr. Polly and others overlooked the condition of claimant's left upper extremity because the right upper extremity was more serious. Dr. Ketchum is appointed as authorized treating physician until the claimant is declared to be at maximum medical improvement.<sup>9</sup>

### **PRINCIPLES OF LAW AND ANALYSIS**

Claimant's cubital tunnel syndrome arose out of and in the course of her employment with respondent.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>10</sup> A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."<sup>11</sup> The phrase "arising out of" employment requires some causal connection between the injury and the employment.<sup>12</sup> The primary issue is, did claimant prove by a preponderance of the evidence that her left cubital tunnel syndrome arose out of and in the course of her employment?

As ALJ Avery stated in the October 11, 2013, preliminary hearing Order, the medical experts who testified identified three competent causes for claimant's cubital tunnel syndrome: (1) her work duties at respondent before undergoing treatment, (2) her work duties after surgery requiring use of her left hand only and (3) her practice of sleeping with her arms crossed, which was initiated as a means of alleviating the upper extremity symptoms resulting from an otherwise admitted compensable injury.

Claimant strongly asserted that her work activities at respondent caused her left cubital tunnel syndrome. She testified of reporting left upper extremity symptoms to Drs. Mead, Polly and Gilbert, but none of them treated her left upper extremity. After claimant left her job with respondent, she worked for two other employers. Claimant testified that her job duties after leaving respondent did not cause her left elbow symptoms to worsen and her symptoms stayed the same.

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<sup>9</sup> ALJ Order (Oct. 11, 2013) at 8.

<sup>10</sup> K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>11</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>12</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

This Board Member finds that claimant tipped the scales and proved her job duties at respondent caused her to develop cubital tunnel syndrome. Respondent asserts the first mention of left ulnar nerve entrapment in any of claimant's medical records was in Dr. Prostic's September 6, 2011, report, more than 18 months after claimant left her employment with respondent. Claimant indicates in her brief that the first mention of left cubital tunnel syndrome was in Dr. Ketchum's October 26, 2010, report. Dr. Ketchum indicated claimant's sleep habits contributed to a stretch neuropathy of her ulnar nerves.

Dr. Carabetta's theory that claimant's cubital tunnel syndrome was not diagnosed sooner because everyone was concentrating on her right side is plausible. The doctor indicated the ulnar nerve is a thick nerve and an injury to the ulnar nerve occurs over time, usually by repetitive activities. Dr. Carabetta, appointed by the court to evaluate claimant, opined that within a reasonable degree of medical certainty claimant's work activities at respondent were "instrumental" in creating her cubital tunnel syndrome.

An EMG conducted by Dr. Hu in April 2009 revealed no evidence of ulnar entrapment neuropathy in either upper extremity. Dr. Gilbert, respondent's expert, saw claimant three times and opined that if claimant has ulnar nerve entrapment, it is not causally related to her activities at respondent. The first time Dr. Gilbert saw claimant was on June 2, 2010, over 12 months after her April 2009 EMG. From April 2009 until she underwent surgery by Dr. Polly, claimant continued making dinner rolls and pizzas, which required her to knead dough.

This Board Member finds it significant that Dr. Gilbert believes in the theory there is no scientific evidence that cubital tunnel syndrome has an occupational etiology. This Board Member finds that Dr. Gilbert's theory is dubious and unpersuasive. This Board Member acknowledges Dr. Carabetta admitted he was speculating that the reason claimant's cubital tunnel syndrome was not detected earlier was because her treating physicians concentrated on her right upper extremity issues. However, despite Dr. Carabetta acknowledging he was speculating about that, he clearly testified that within a reasonable degree of medical certainty, it was still his opinion that claimant's work activities at respondent caused or contributed to her cubital tunnel syndrome. That opinion is supported by claimant's testimony that her left upper extremity condition developed while working for respondent and has remained the same ever since.

In light of the fact this Board Member finds claimant's work activities at respondent caused her cubital tunnel syndrome, claimant's other two causation theories that her left cubital tunnel syndrome either resulted from overuse of her left upper extremity following her right carpal tunnel release or from her sleep habits will not be addressed.



By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>13</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>14</sup>

**WHEREFORE**, the undersigned Board Member affirms the October 11, 2013, preliminary hearing Order for Medical Treatment entered by ALJ Avery.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2014.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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Honorable Brad E. Avery, Administrative Law Judge

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<sup>13</sup> K.S.A. 44-534a.

<sup>14</sup> K.S.A. 2012 Supp. 44-555c(k).